



## CLOSED CASE SUMMARY

ISSUED DATE: JANUARY 12, 2021

FROM: DIRECTOR ANDREW MYERBERG  
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2020OPA-0258

### **Allegations of Misconduct & Director's Findings**

#### **Named Employee #1**

Allegation(s):		Director's Findings
# 1	5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 4. Retaliation Is Prohibited	Not Sustained (Unfounded)

#### **Named Employee #2**

Allegation(s):		Director's Findings
# 1	5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 4. Retaliation Is Prohibited	Not Sustained (Unfounded)

#### **Named Employee #3**

Allegation(s):		Director's Findings
# 1	5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 4. Retaliation Is Prohibited	Not Sustained (Unfounded)

#### **Named Employee #4**

Allegation(s):		Director's Findings
# 1	5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 5. Supervisors Will Investigate or Refer Allegations of Policy Violations Depending on the Severity of the Violation	Not Sustained (Inconclusive)

***This Closed Case Summary (CCS) represents the opinion of the OPA Director regarding the misconduct alleged and therefore sections are written in the first person.***

### **EXECUTIVE SUMMARY:**

The Complainant alleged that he was arrested due to retaliation on the part of Named Employee #1, Named Employee #2, and Named Employee #3. OPA further alleged that Named Employee #4 may have failed to report misconduct when required.

### **SUMMARY OF INVESTIGATION:**

Named Employee #1 (NE#1), Named Employee #2 (NE#2), and Named Employee #3 (NE#3) were dispatched to a threats/harassment call that turned into an assault investigation. It was reported that an individual – later identified as the Complainant – was yelling at and threatening to assault people. The call was updated to indicate that the



Complainant assaulted someone and then left the scene. The officers knew the Complainant – a Real Change vendor – from prior incidents and were aware that he had been trespassed from other businesses for similar conduct. When the officers arrived at the location of the crime, they spoke to business employees who confirmed that the Complainant had been yelling and threatening to assault people. The officers also spoke with the victim of the assault, who stated that the Complainant hit him in the shoulder. The officers conducted an area check to try to find the Complainant but were unsuccessful.

While on patrol several hours later, the officers observed the Complainant at a 7/11 store. The officers contacted him and placed him under arrest. The Complainant acknowledged that he was yelling at someone but denied that he committed an assault. The Complainant was taken into custody and transported to the North Precinct. At around this time, the Complainant alleged to NE#3 that he felt his arrest was based on retaliation for him filing prior OPA complaints against officers. NE#3 informed his supervisor, Named Employee #4 (NE#4), of this allegation.

NE#4 spoke with the Complainant. He confirmed his belief that he had been subjected to retaliation and improperly arrested.

OPA later received a complaint from the Complainant, in which he asserted his retaliation allegation. After receiving this complaint, OPA conducted its intake investigation, which included reviewing Body Worn Video (BWV). During that review, OPA identified that NE#4 was aware of the allegation of misconduct; however, there was no indication that she filed an OPA complaint or, in the alternative, that she screened the allegation with OPA through the unsubstantiated misconduct screening program. As such, OPA alleged that NE#4 may have violated Department policy.

At her OPA interview, NE#4 asserted that she did not initially screen the incident with OPA but that she spoke with a Lieutenant. She said that the Lieutenant told her that he had screened the incident with OPA and that she did not need to take any further action. Accordingly, she did not make an OPA referral or herself screen the incident. She said that two other Sergeants – Sergeant #1 and Sergeant #2 – were aware that she screened the incident with the Lieutenant and that she was told that it was handled. She believed that the OPA Director was unavailable on the date in question and that the incident may have been screened with a specific OPA Sergeant or the OPA's Deputy Director of Investigations.

OPA further interviewed Sergeant #1, Sergeant #2, and the Lieutenant. Sergeant #1 did not work on the day that the case was purportedly screened with the Lieutenant. Sergeant #2 did work that day but had no recollection of any discussion regarding the screening of this incident and did not remember being involved in any conversation with NE#4 and the Lieutenant. The Lieutenant had no recollection of screening this incident. While he had screened other incidents with OPA in the past, he did not recall doing so here. He stated that his normal process when screening an incident would be to call or email the OPA Director. He said that he had never screened an incident with the OPA Sergeant referenced by NE#1, or with OPA's Deputy Director of Investigations. The Lieutenant stated that he had no evidence in his possession suggesting that he screened this incident.

OPA's investigation indicated that the Lieutenant did not make or receive any calls on his landline or cell phone on the date in question. There were also no emails to OPA screening this incident. Moreover, no personnel at OPA received any emails from any SPD employee concerning the screening of this incident.

**ANALYSIS AND CONCLUSIONS:**



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**Named Employee #1 - Allegation #1**

***5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 4. Retaliation Is Prohibited***

The Complainant asserted that NE#1, NE#2, and NE#3 arrested him due to retaliation for his prior OPA complaints. If true, this would constitute a violation of SPD Policy 5.002-POL-4.

From OPA's review of the evidence – most notably, the BWV, there is no evidence supporting the Complainant's claim of retaliation. To the contrary, the Complainant's arrest was based on information obtained from witnesses and the victim of the assault. Moreover, while the officers were familiar with the Complainant, none of them ever referenced his prior OPA complaints or gave any indication that the arrest was effectuated for any improper motive.

Accordingly, OPA recommends that this allegation be Not Sustained – Unfounded as against NE#1, NE#2, and NE#3.

Recommended Finding: **Not Sustained (Unfounded)**

**Named Employee #2 - Allegation #1**

***5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 4. Retaliation Is Prohibited***

For the same reasons as stated above (see Named Employee #1 – Allegation #1), OPA recommends that this allegation be Not Sustained - Unfounded.

Recommended Finding: **Not Sustained (Unfounded)**

**Named Employee #3 - Allegation #1**

***5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 4. Retaliation Is Prohibited***

For the same reasons as stated above (see Named Employee #1 – Allegation #1), OPA recommends that this allegation be Not Sustained - Unfounded.

Recommended Finding: **Not Sustained (Unfounded)**

**Named Employee #4 - Allegation #1**

***5.002 - Responsibilities of Employees Concerning Alleged Policy Violations 5. Supervisors Will Investigate or Refer Allegations of Policy Violations Depending on the Severity of the Violation***

SPD Policy 5.002-POL-5 requires supervisors who become aware of a potential policy violation to investigate or refer the allegations depending on their severity. Minor allegations of misconduct may be investigated by a supervisor, while allegations of serious misconduct – such as retaliation – must be referred to OPA. (SPD Policy 5.002-POL-5.)

NE#4 adamantly and continuously asserted that she screened the potential allegation of misconduct through the Lieutenant and that she was told that it was handled and that no further action was needed. She cited to this as the reason why she did not file an OPA complaint or, herself, screen this incident with OPA. However, OPA uncovered evidence suggesting that this did not occur. Most notably, the following evidence was weighed heavily by OPA: the lack of any emails or phone calls to or from the Lieutenant to OPA; the lack of any records of the screening within



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OPA; the fact that the Lieutenant had never screened an incident with either the specific OPA sergeant referenced by NE#4 or the OPA Deputy Director of Investigations; the fact that Sergeant #1 did not work that day; and the fact that OPA Director was not unavailable on that date, as recalled by NE#4.

However, OPA notes that there is a substantial evidentiary gap. Namely, neither the Lieutenant nor Sergeant #2 could definitively say that the screening did not occur. The Lieutenant had no recollection of or records concerning the screening, but he did not explicitly confirm that it was impossible that it happened. Similarly, Sergeant #2 had no recollection of observing a conversation between NE#4 and the Lieutenant, but he did not foreclose that it could have occurred. Had either or both expressly disclaimed that the screening took place as described by NE#4, OPA not only would have Sustained this allegation, but likely also would have found that NE#4 engaged in dishonesty. In the absence of this, OPA cannot meet its evidentiary burden to establish misconduct on NE#4's part. In reaching this finding, OPA is careful to note that it does not conclude that NE#4 did not violate policy or, stated differently, that she properly screened this matter. OPA only determines that the evidence is ultimately inconclusive one way or the other.

Accordingly, OPA recommends that this allegation be Not Sustained – Inconclusive.

Recommended Finding: **Not Sustained (Inconclusive)**